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I. The decision of the Court below, in failing and refusing to decide, as a matter of law, in favor of petitioner and against the Board, as to the reinstatement of Jones, upon the Board's findings of fact, that, "During the afternoon of Saturday, July 24, 1937, Jones was laid off by his foreman . . . The evidence shows that Jones was under the influence of liquor that afternoon and could not perform his work", (a) has not given proper effect to applicable decisions of this Court, in which it has been repeatedly held that "The Act does not interfere with the normal exercise of the right	

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of the employer to select his employees or to discharge them." *N. L. R. B.* v. *Jones & L. Steel Corp.* 301 U. S. 1, 45, 81 L. ed. 893, 916; *The Associated Press* v. *N. L. R. B.*, 301 U. S. 103, 132, 81 L. ed. 953, 961; and *N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 254, 257, 83 L. ed. 627, 634, 636..... 17

II and III. The decision of the Court below, sustaining the Board's order reinstating Jones, made the following findings and conclusions of law inconsistent with its own judgment or decree, "*Much of the evidence on which the Board relied was contradicted;* but it is for the Board, and not for us, to weigh conflicting testimony and pass upon credibility. *Perhaps a reasonable mind might conclude that Jones was discharged solely for intoxication, but certainly a reasonable mind might conclude that there was a connection between his union activities and his discharge;* these findings and conclusions were (a) contrary to law, (b) in conflict with the decisions of other Circuit Courts of Appeal such as the decision of the Eighth Circuit in the case of *Bussmann Mfg. Co.* v. *N. L. R. B.*, 111 F. (2d) 783, 786-787, in which the Eighth Circuit held that where the cause of an employee's discharge "*may have been one of two things, one of which was illegal and the other legal, the fact finding tribunal can not guess between the two causes . . .*" and was in conflict with the Fourth Circuit in the case of *Appalachian Electric P. Co.* v. *N. L. R. B.*, 93 F. (2d) 985, 989, in which the Court said, "In either case, substantial evidence furnishes a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which

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merely creates a suspicion or which amounts to no more than a scintilla or which *gives equal support to inconsistent inferences"*, (c) has not given proper effect to applicable decisions of this Court, and (d) has so far departed from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision..... 20

IV, V and VI. The decision of the Court below of December 9, 1940, as amended by its order of January 14, 1941, denied petitioner that due process of law guaranteed by the Fifth Amendment of the Constitution of the United States by stating the issues in this case so as to enable the Court to avoid its duty under the Act, by omitting from the Court's statement of facts those findings of the Board which were favorable to petitioner and upon which petitioner relied in refusing to obey the order of the Board, by evading its duty to decide the issues of law raised by said omitted facts, and, after the inclusion of certain of these facts in its amended order, by the persistent refusal of the Court below to pass upon the legal issues arising therefrom..... 23

VII and VIII. The decision of the Court below by accepting the uncorroborated testimony of Jones as substantial evidence supporting the Board's order, by its refusal to pass upon the credibility of Jones' testimony (Petitioner's brief, pp. 13-16), when the record and the findings of the Board established that Jones was a drunken prevaricator, who repeatedly gave false testimony on material issues at the Board's hearing; and by holding that there was substantial evidence that petitioner had engaged in unfair labor practices within the meaning of Sec. 8 (3) of the Act, was

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(a) in conflict with the decision of the Fifth Circuit in the case of *Magnolia Petroleum Co.* v. *N. L. R. B.*, supra, where it was held, "In its capacity as an accuser, the Board like any other person on whom the burden of proof rests to establish the right of a controversy, *must produce credible evidence* from which men of unbiased minds can reasonably decide in his favor. It cannot any more than any other litigant can 'leave the right of the matter to rest in mere conjecture and expect to succeed'. *Samulski* v. *Menasha Paper Co.*, 147 Wis. 285, 133 N. W. 142, 145; "It is the duty of the Board to decide the case before it on all the evidence. *It is not at liberty to rely upon part of the evidence in support of its findings and put aside all other undisputed evidence", P. & O. S. S. Co.* v. *N. L. R. B.*, 98 F. (2d) 411, 415; (b) has not given proper effect to applicable decisions of this Court, as was said in *N. L. R. B.* v. *Columbian E. & S. Co., Inc.*, supra, "But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is substantial, *that is, affording a substantial* basis of fact from which the fact in issue can be reasonably inferred." 24

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No.———

ARCADE-SUNSHINE COMPANY, INC.
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD
Respondent

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia

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Arcade-Sunshine Company, Inc., prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the District of Columbia entered on December 9, 1940, granting the petition of respondent, National Labor Relations Board (herein the Board), for the enforcement of its order against petitioner, Arcade-Sunshine Company, Inc.

OPINIONS BELOW

The findings of fact, conclusions of law and order of the Board (R. 33-51) are reported in XII N. L. R. B. 259. The opinion of the United States Court of Appeals for the District of Columbia is reported in *National Labor Relations Board* v. *Arcade-Sunshine Company, Inc.* —— F. (2d) ——.

JURISDICTION

The decree of the United States Court of Appeals was entered December 9, 1940 (R. 519). A petition for rehearing was filed by petitioner on December 26, 1940 (R. 521). An order was entered by the United States Court of Appeals on January 14, 1941, amending its opinion of December 9, 1940 and denying the petition for rehearing (R. 525), without specification of reason. By an order of March 7, 1941, the Court below again amended its opinion and decree of December 9, 1940 (R. 536). On March 13, 1941, it again amended its amendment of March 7, 1941 (R. 542). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, Title 28 U. S. C., Section 347, and Section 10 (e) and (f) of the National Labor Relations Act, 29, U. S. C., Section 160.

QUESTIONS PRESENTED

1. Whether the Court below erred in refusing to decide as matter of law, in favor of petitioner and against respondent, as to the reinstatement of William Jones, on the Board's findings of fact, that, "During the afternoon of Saturday, July 24, 1937, Jones was laid off by his foreman—The evidence shows that Jones was under the influence of liquor during that afternoon and could not perform his work." (R. 45.)

2. Whether the Court below erred in sustaining the Board's order requiring petitioner to reinstate Jones with back pay, when the Court below made express findings and conclusions which are inconsistent with said judgment and

contrary to law, to wit: "Much of the evidence on which the Board relied was contradicted; but it is for the Board and not for us, to weigh conflicting testimony and pass upon credibility. Perhaps a reasonable mind might conclude that Jones was discharged solely for intoxication, but certainly a reasonable mind might conclude that there was a connection between his union activities and his discharge."*

3. Whether the Court below erred in enforcing the order of the Board, with respect to Jones, by refusing to follow the decisions of this Court, such as *N. L. R. B.* v. *Columbian Enameling and Stamping Co., Inc.*, 306 U. S. 292, *299*, and of other Circuit Courts, such as *Bussmann Mfg. Co.* v. *N. L. R. B.* 111 F (2d) 783, *786-787* (8 C. C. A., May 14, 1940), in which it was held that where the cause of an employee's discharge "may have been one of two things, one of which was illegal and the other legal, the fact finding tribunal can not guess between the two causes—."

4. Whether, in its decision of December 9, 1940, the Court below erred:

(a) By so stating the issues in this case as to avoid its duty under the National Labor Relations Act:
(b) By omitting from the Court's statement of facts those findings of the Board which were favorable to the petitioner, and upon which petitioner relied in refusing to obey the order of the Board;
(c) By thus evading its duty under the Act to decide the issues of law arising from said facts, issues which were raised by the Board in its decision and order, issues which were carefully and fully presented to the Court below in the briefs of the respondent and of petitioner and issues which were urged upon the Court below by petitioner's counsel in his oral argument.

5. Whether, in its order of January 14, 1941, the Court below erred in amending its previous decision of December 9, 1940, by including an apocryphal version of the Board's

*Underscoring ours.

findings, previously omitted, and in persisting in its refusal to decide the issues of law arising therefrom.

6. Whether, by its conduct aforesaid, the Court below erred, as a "tribunal competent by the law of its creation to pass upon the subject matter" in failing and refusing to make "a judicial determination of the issues," and thus deprived petitioner of that due process of law guaranteed by the Fifth Amendment of the Constitution of the United States.

7. Whether the Court below erred, by accepting the uncorroborated self-serving testimony of Jones as substantial evidence supporting the Board's order, and by refusing to pass upon the question of Jones' credibility when the record and other findings of the Board established that Jones was a drunken prevaricator who repeatedly gave false testimony on material issues at the Board's hearing.

8. Whether the Court below erred in holding that there was substantial evidence that petitioner has engaged in unfair labor practices within the meaning of Section 8 (3) of the National Labor Relations Act.

9. Whether the Court below erred in refusing to follow the decision of the Supreme Court in *N. L. R. B. v. Express Publishing Company*,—U. S.,—(March 3, 1941) by ordering petitioner to post the notices (R. 50) required by the Board, including paragraph 1 (b), requiring the petitioner to refrain among other things from violating the provisions of Section 8 (5) of the Act, which petitioner has never been charged nor found guilty of violating.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are printed in the appendix of this petition.

STATEMENT

The petitioner is engaged in the laundry and dry cleaning business in Washington, D. C. It employs from 350 to 400 persons. Most of its business is carried on in the District of Columbia, but a few of its customers reside in Maryland.

Petitioner, in this proceeding, seeks review on an order of the United States Court of Appeals for the District of Columbia, enforcing, with slight modifications, an order of the Board, the details of which are hereinafter discussed. The pleadings, evidence, findings, order of the Board, and decision of the Court below are given in detail, *infra*. To summarize the background and issues:

During February, March and April, 1937, the Laundry Workers, Cleaners and Dyers International Union, Local 187, conducted a campaign to organize the laundry workers in the District of Columbia. The Board found that a number of petitioner's employees joined the union. Concerning this statement, petitioner has no knowledge, but it does agree with the Board's statement that some time in the summer of 1937 "the union called a strike in the industry" and that "respondent's (petitioner here) plant was picketed for several days" and that while "The strike lasted for 3 weeks" there was no strike of petitioner's employees; which would seem to discredit the Board's statement that "a number of respondent's employees joined the union."

On July 2, 1937, the aforesaid A. F. of L. Local filed charges of unfair labor practices with the Board against the petitioner. On July 7, 1937 this Local was notified by the International, of which it was a member, that its charter had been revoked for non-payment of dues. On August 11, 1937, the then unaffiliated labor organization filed an amended charge with the Board. On September 24, 1937, this organization was advised that it would be received into the C. I. O.

While the record in this case is not voluminous, it is filled with extraneous matter. There are actually only two very simple questions for the determination of the Court. These

are questions of law which the Court could determine without reference to the record, to-wit:

1. Whether the Board and the Court below erred in ordering petitioner to reinstate and make whole William Jones, after an express finding by the Board that, at the time of his discharge, Jones was so drunk that he could not perform his work.

2. Whether, having already posted notices in conspicuous places in its plant that it will refrain from discouraging union membership and from interfering with the right to self-organization on the part of its employees, petitioner must post additional notices, including the obnoxious paragraph 1 (b) held illegal by this Court in *N. L. R. B.* v. *Express Publishing Co., supra,* although petitioner has neither been charged nor found guilty of violating Section 8 (5) of the Act.

PROCEDURAL FACTS

The Amended Charge (R. 8) was filed with the Board on August 11, 1937. It is alleged therein that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act.

The Complaint (R. 6) alleged that petitioner violated Section 8 (3) of the Act by discharging and thereafter refusing to reinstate Alexander Parker, Joseph H. Gordon, and William Jones. It is also alleged that petitioner by said discharges, and in other ways, had attempted to prevent its employees from joining a labor organization of their own choosing in violation of Section 7 and Section 8 (1) of the Act.

The Complaint as to Joseph H. Gordon was dismissed by the Trial Examiner (R. 200) on motion of the Board's attorney who said, "I talked with Joseph Gordon and I am convinced that his name should not have been included in this complaint, and that he did not want to be made a party to the complaint. He is not present, but he expressed a desire to have the matter dropped, so far as his case was concerned."

The Complaint as to Alexander Parker was dismissed by the Board in its decision and order (R. 45). The Board said, "Although Parker's case is not free from doubt, we think that respondent's contention that he quit his employment is supported by the evidence."

Thus there were only two things left in the complaint as heretofore stated, the discharge of Jones, in violating Section 8 (3) and the matter of petitioner's alleged violation of Section 8 (1) by interfering with the right of self-organization on the part of petitioner's employees.

The Answer of Petitioner (R. 10) denied that it discharged William Jones because of his membership in and activities on behalf of the union and alleged that "Said William Jones was intemperate in his habits during business hours and was found to be intoxicated and warned on several occasions and finally was dismissed on account of continual annoyance due to being drunk, having been discharged for the same reason on previous occasions." The answer also denied that petitioner had been guilty of violating Section 8 (1) of the Act.

The Hearing was held in Washington, D. C., on March 22, 28, 29 and 30, 1938 (R. 15); the Trial Examiner's report was dated April 20, 1938 (R. 28); the hearing before the Board for oral argument was held October 25, 1938, (R. 33); the decision and order of the Board was issued April 15, 1939 (R. 33); and its petition for enforcement of its order was filed with the Court below on February 6, 1940, (R. 1).

The Board's decision found that petitioner had interfered with, restrained and coerced its employees in violation of Section 8 (1) and (3) in the exercise of rights guaranteed by Section 7 of the Act, and ordered petitioner to cease and desist from said practices; to offer to William Jones immediate and full reinstatement to his former position and make him whole for any loss of pay he may have suffered by reason of his discharge, to reimburse government agencies for work relief payments made to him and to post cease and desist notices for a period of 60 days in conspicuous places throughout its plant.

In only two respects below did the Court set aside the order of the Board. On December 9, 1940 it struck the provision that petitioner must reimburse government agencies for work relief payments made to Jones, after the Supreme Court had so ruled in the Republic Steel Case; and on March 7, 1941, after this Court's decision in *N. L. R. B.* v. *Express Publishing Company, supra,* it left off the "cease and desist" clauses in the notice, but still required petitioner to post the whole of paragraph (b) 1, over the protest of the petitioner.

Proceedings in the United States Court of Appeals for the District of Columbia. The Board filed its petition for an enforcement with the Court below (R. 1). Petitioner, believing that the findings of the Board with respect to Jones constituted a legal bar to enforcing the order with respect to him, filed a motion with the Court below asking that it deny that part of the Board's order and authorize petitioner to post notices (R. 502). The Court below denied said motion.

After the filing of briefs and oral argument the decision of the Court below was handed down on December 9, 1940, (R. 515). Petitioner filed its petition for rehearing, (R. 521) which was denied on January 14, 1941, by an order of the Court amending its former decision (R. 525). Petitioner then filed a petition for reconsideration of its petition for rehearing, which was denied. On March 7, 1941, the Court below, on its own motion, issued a second amended order (R. 536). On March 12, 1941, petitioner filed its second petition for rehearing (R. 539). On March 13, 1931 the Court below amended its order of March 7, 1941, and again denied the petition for rehearing (R. 542).

EVIDENTIAL FINDINGS AND HOLDINGS OF COURT BELOW ANALYZED AND CRITICISED

With great reluctance petitioner says that the decision of the Court below is factually and legally defective. Petitioner is aware that such criticisms are usually directed at decisions of the Board. In this case, when compared with

the Board's decision, the opinion of the Court below is inaccurate and evasive, scholastically defective and of no judicial worth.

To illustrate:

(1) The Board had the courage to find, although denied by Jones (R I, 170, 194-195, 199, 484), that he "was discharged on August 4, 1934, due to 'drinking while working' and rehired three days later. He continued in the respondent's employ as a presser and steamer until on or about July 24, 1937, when he was discharged. *The respondent contends that Jones was again discharged because of drunkenness.*"* (R. 45.)

The Court below in its decision of December 9, 1940, said "*Respondent contends that Jones was discharged for habitual drunkenness.** The foreman so testified. Jones admitted that he 'always did drink.' In 1934 he was discharged, but reinstated a few days later." (R. 517).

In other words the Board's decision states that petitioner discharged Jones once before for "drinking while working" and the Court below omits that very important fact. The Board's decision admits that petitioner's contention is that Jones was discharged for drunkenness, while the Court below suggests, and attempts to fortify its position by referring to the foreman's testimony, that petitioner discharged Jones for "habitual drunkenness." Neither the Board nor the Court made any reference to the fact that the evidence showed, as testified to by the very foreman whom the Court quotes in an effort to establish that Jones was discharged for a habit rather than a condition, that, prior to Jones's discharge, a futile effort was made by one of the officers of petitioner to sober Jones up so that he could do his work. We can well understand why the Board would not refer to this evidence. It would have destroyed the Board's inference that this foreman and the president of the company were guilty of "an obvious effort to construct a case against Jones and to cover up the real reason for his discharge." (R. 47).

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*Italics ours.

Yet this very foreman, who was quoted with approval by the Court below, testified, "He (Jones) was there steaming his coats, and so he couldn't make much time about it; so Mr. Melvin Viner took him in the curtain department, where we steam blankets, so we could sweat the liquor out of him, but instead of that he got worse, and so that evening we let him go." (R. 203). The attention of the Court below was directly called to this testimony in the oral argument by petitioner's counsel.

(2) The Board also had the courage to find, although again denied by Jones (R. 196, 197, 198, 199 and 486), that "It is clear that Jones was an intemperate employee.—— The record shows that Jones on occasion came to work in an intoxicated condition and had to be sent home or absented himself from the plant due to intoxication. There is also evidence that the respondent received complaints regarding the steaming of velvets and other apparel, most of which work was done by Jones . . ." (R. 46), and "The evidence shows that Jones was under the influence of liquor during that afternoon and could not perform his work." (R. 45).

Not a single one of these findings of fact by the Board were included in the Court's decision of December 9, 1940. The only refernce to Jones' testimony about his drinking is an approving pat on the back, an obvious effort to bolster his credibility, when the Court below said, "Jones admitted that he 'always did drink.' " Not a single thing is said to indicate that the Court took judicial notice of the Board's findings which established the fact that Jones was an untruthful witness.

Petitioner does not contend that the Court had to refer in its decision to each and every finding made by the Board which was favorable to petitioner. We do contend that simple honesty required that when the Court purported to summarize the facts of the case, it should have given a fair picture of the evidence, at least in miniature, and not a distorted and biased statement, such as was given in its decision of December 9, 1940.

Although on three different occasions, prior to the decision of December 9, 1940, petitioner had called the Court's attention to these findings of fact by the Board, and had stated unequivocally that it relied upon them as its defense, the Court below completely ignored the existence of any findings by the Board, favorable to petitioner, in its said decision.

(3) The Board further had the courage, in its decision, to state the legal issue which was raised by its findings of fact. It said, quoting one of its former decisions, "While proof of the presence of proper causes at the time of discharge may have relevancy and circumstantial bearing in explaining what otherwise might appear as a discriminatory discharge, such proof is not conclusive. The issue is whether such causes in fact induced the discharge or whether they are but a justification of it is retrospect."[10]

In the Board's brief (pp. 18 and 19) filed herein, it once again presented this issue of law to the Court,

> "Jones as the Board found was an intemperate worker. That or any other proper cause would have afforded respondent a valid ground for his discharge. But the question before the Board was not whether respondent *could* have discharged Jones for proper

[10] "*Matter of Kelly-Springfield Tire Company and United Rubbers of America, Local No. 26, et al.*, 6 N. L. R. B. 325, enforced in the *Kelly-Springfield Tire Company* v. *N. L. R. B.*, 97 F. (2d) 1007 (C. C. A. 4th, 1938)."

It might be inferred that the statement which the Board quoted was from the Court's opinion. Such was not the case. The language quoted is from the Board's decision, 6 N. L. R. B. 342. The decree of the Court was a consent decree. In the Kelly-Springfield case, on page 337 of its decision, the Board says, "There can be no serious dispute of the right of the employer to select its employees or to discharge them." A further examination of the Board's Kelly-Springfield decision shows how utterly dissimilar the facts were in that case to the facts in the instant case. Of the six men ordered by the Board in that case to be reinstated four were or had been officers of the union and members of its grievance committee and the other two had been strong union men "from the early days of the union."

cause; the only question was whether in *fact* respondent *did* discharge him for cause.

"The incident claimed by respondent to have precipitated Jones' discharge occurred on a Saturday afternoon in the latter part of July. That afternoon, Jones, as the Board found (R 45), was under the influence of liquor and could not perform his work."

In petitioner's brief (pp. 26-31) the same issue of law was urged to the Court, supported by eminent legal authority:

"——We do contend that where the evidence clearly shows that an employer had a justifiable cause to discharge an employee, and the Board, has, in its Decision and Order made Findings of Fact accepting such evidence as true, the Board must find for the Respondent.

"We also urge that the Board may not make Findings in favor of a Respondent which warrant the discharge of an employee and yet reach a conclusion that the employee was discharged for another cause upon inference and suspicion. In other words, we contend that inference cannot be legally indulged in to destroy established facts which in themselves would have constituted a just cause for the discharge of an employee 'had there been no labor controversy in progress.' *Bussmann Mfg. Co. et al.* v. *N. L. R. B.*, 111 F. (2d) 783, 786-787, (8 C. C. A. May 14, 1940."

In its oral argument to the Court below petitioner's counsel carefully analyzed each of the cases which were cited in the Board's brief as sustaining its position. Petitioner showed the Court below how, in each of those cases, the discharged employees were either the officers or most active organizers of their respective unions, and that in those cases the inferences of the Board were founded on substantial evidence, and were not, as in this case, based upon speculation and the uncorroborated word of a single witness whom the Board by its own findings had determined was a drunken perjurer.

But the Court below, by leaving out of its decision of December 9, 1940, all reference to those findings of the Board upon which the petitioner relied for its defense,

evaded its duty under the Act to pass upon the merit of petitioner's defense. When a rehearing was requested by petitioner, and the Court's attention was directed to the fact that it had omitted these facts and failed to decide the issues of law arising therefrom, the Court below then issued an order on January 14, 1941, denying the petition for rehearing without comment and amending its findings of fact as follows:

> "On page 2, after the fourth sentence in the third full paragraph, insert the following sentence: The Board found that on the day of his 1937 discharge he was under the influence of liquor and could not do his work."

Petitioner does not believe that this Court will countenance such an obvious evasion of its duty by the Court below, such a palpable effort to correct the appearance of evil without even an excuse to justify its refusal to consider petitioner's defense. The conduct of the Court below was a denial of due process. When a court of first impression refuses to decide an issue of law upon which the rights of the parties depend, when that issue has been fully and fairly presented to it, then the unfortunate litigant, in this case your petitioner, has been denied his day in court.

We respectfully urge that the refusal of a court, in a civil case, to decide an issue of law essential to the rights of the parties litigant, is as great a deprivation of due process as the refusal to call negroes for grand jury service in criminal cases, as held by this Court.

As further evidence that the Court below denied the very existence of any legal questions in this case, we quote the following from its decision, "Respondent contends that the findings are unsupported and that the order exceeds the Board's authority." That such was not the case petitioner refers this court to pages 26 to 31 of its brief below.

In an apparent effort to excuse its failure to either consider the facts or the law in this case the Court below said, "The Board's findings of fact, if supported by evidence,

are conclusive." As interpreted by this Court we do not question that statement. **But where in the Act, may we ask, does it provide that the Board's conclusions of law are binding upon any Court?***

The Board is a fact-finding body without power to enforce its orders. It has considered itself as Labor's Tribunal to correct specific offenses mentioned in the Act. It has not even pretended to be an impartial and unbiased government agency acting in the public welfare. As reported in the public press (The Washington Post, Feb. 23, 1941), in the presence of Mr. Justice Edgerton and some members of this Court, Mr. Madden, Chairman of the Board at the time this decision was issued, said,

> "Any attempt by the board to be 'all things to all people' in its decisions would have been not only a dereliction of duty but a tactical blunder gravely harmful to the public interest."

If it was the intent of Congress, as contended by Mr. Madden, that the Board should not be 'all things to all people' it was also the intent of the Congress that the Courts should protect all of our citizens against the excesses or abuse of discretion by the Board. That, we believe, is why the Act provides for a review of the evidence and a determination of the legal issues by a court before it shall issue an order enforcing any decision by the Board. Specifically, the Act provides that the reviewing court,

> "shall have jurisdiction of the proceedings and of the question determined therein . . . and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." (Section 10 (e) and (f).)

It is the duty of the Court, under this section of the Act, to make an independent examination of the record to determine if there is substantial evidence supporting the find-

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*Emphasis ours.

ings and order of the Board. It is likewise the exclusive function of the Court to pass upon "the question determined therein." The Act does not even require that members of the Board shall be lawyers. Clearly then the Congress intended that the Court should pass upon the legal defenses of an employer "upon the pleadings, testimony, and proceedings" and make such an order as the law and the evidence warrant. The Court may no more evade its statutory duty by remaining mute than a prisoner before the bar of justice can escape punishment by refusing to plead guilty or not guilty.

Yet, in this case, the Board passed upon the legality of its own conduct and cited its own opinion in a previous case as its authority, no court having as yet to our knowledge given its sanction and approval to any such pronouncement. Thus the Court below allowed the Board to abrogate its exclusive function to pass upon the law of this case and by its silence deprived petitioner of rights guaranteed to it under the Act, that "the question determined therein" should be passed upon by the Court.

Some judges seem to be of the impression that the primary function of courts under the Act is to enforce the orders of the Board. Even a minority of this Court expressed an opinion that the Congress invested the Board and not the Court with ultimate discretionary powers, *N. L. R. B.* v. *Express Publishing Company, supra,* where Mr. Justice Douglas, in a dissenting opinion said,

> "Congress has invested the Board, not us, with the discretion to choose and select the remedies necessary or appropriate for the evil at hand . . . Whether the remedy chosen by the Board was reasonably necessary in this case is not for us to determine. Nor is it for us to say what language is adequate to safeguard the labor rights which are in issue."

The majority of this Court thought otherwise and held, by Mr. Justice Stone,

> " . . . we can hardly suppose that Congress intended that the Board should make or the court should enforce orders which could not appropriately be made in judicial proceedings."

Most of our circuit courts consider that they have a statutory duty, under the Act, to protect the rights of all parties appearing before the Board. *Magnolia Petroleum Co.* v. *N. L. R. B.* 112 F (2d), 545, *547-549*.

After a fashion the Court below did review the evidence. But even in this respect it failed of its duty. Congress did not say that the Court should review part of the evidence, neither did it say that it should consider only part of the findings of the Board. Yet, as we have heretofore proven from a comparison of the findings of the Board and of the Court below, the decision of the Court adopted every adverse finding of the Board, damaging to the petitioner, and rejected every finding of the Board that was favorable to it.

Even though the Court, on petitioner's protest, amended its first findings of fact, it still refused to pass upon the legal significance of its amendment. Petitioner respectfully urges that the decision of the Court below denied it the kind of review of the evidence that was contemplated by the Congress in the Act.

The rights of the petitioner have been disregarded by the Court below. It has steadfastly refused to consider a single point raised by petitioner except on such issues as have been passed upon by the Supreme Court during the pendency of this action in the Court below. To illustrate, it could not well ignore the decision of the Supreme Court in the Republic Steel case, when petitioner delivered copies of that opinion to the Court below prior to its decision. Its second amendment was made four days after the decision of this Court in *N. L. R. B.* v. *Express Publishing Co., supra.* This amendment was made despite the protest of

Mr. Justice Edgerton at a conference called by the Court on March 7, 1941 with counsel for the Board and the petitioner. Furthermore, the amendment that was made by the Court below, on March 7, 1941, did not follow either the reasoning or holding by this Court in the *Express Publishing Co.* case. (See Second Petition for Rehearing R. 539).

Although petitioner has repeatedly directed the attention of the Court below to the fact that it erred in giving credence to the testimony of William Jones (Petitioner's Brief, pp. 13-16), and has seven times asked the Court to pass upon the merit of its defense in discharging Jones, the Court has yet to saw one word on either subject. Thus by closing its eyes to the facts and its ears to the law, the Court below issued a decision couched in the verbiage of justice but which denied justice.

Petitioner has repeatedly called the attention of the Court below to the fact that in this case there was no substantial evidence, supporting the findings of the Board, that Jones was discharged "because of his membership in and activity on behalf of the union", or the findings of the Court that "certainly a reasonable mind might conclude that there was a connection between his union activities and his discharge."

These findings were based solely upon the self-serving, uncorroborated words of William Jones. Only by honoring the testimony of this witness, whom the Board found was "an intemperate employee", who had been previously discharged by petitioner for "drinking while working", and was discharged on July 24, 1937, while "under the influence of liquor" and unable to "perform his work", all of which was denied by Jones, could either the Board or the Court make any such findings.

REASONS FOR GRANTING THE WRIT.

I.

The decision of the Court below, in failing and refusing to decide, as a matter of law, in favor of petitioner and against the Board, as to the reinstatement of Jones, upon

the Board's findings of fact, that, "During the afternoon of Saturday, July 24, 1937, Jones was laid off by his foreman . . . The evidence shows that Jones was under the influence of liquor that afternoon and could not perform his work", (a) has not given proper effect to applicable decisions of this Court, in which it has been repeatedly held that "The Act does not interfere with the normal exercise of the right of the employer to select his employees or to discharge them." N. L. R. B. v. Jones & L. Steel Corp. 301 U. S. 1, 45, 81 L. ed. 893, 916; The Associated Press v. N. L. R. B. 301 U. S. 103, 132, 81 L. ed. 953, 961; and N. L. R. B. v. Fansteel Metallurgical Corp. 306 U. S. 240, 254, 257, 83 L. ed. 627, 634, 636.

The foregoing issue has been fully and fairly presented to the Court below on seven different occasions. (Petitioner's brief, pp. 26-31). We have not received any indication that the Court below gave any consideration to the above question of law. In thus failing to consider and to decide on the merit of petitioner's defense, we urge that the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Petitioner's position has been consistent throughout the various proceedings in the Court below. We do not believe that Jones ever joined a union or was active on behalf of a union, but assuming otherwise, it is our contention that the cloak of union membership or union activities does not protect an employee against discharge due to his own misconduct; and that when the Board made a finding of fact that Jones was under the influence of liquor and could not perform his work at the time of his discharge, that absolutely settled rights of the parties under the Act, and the finding of the Board, and the order of the Court below should have been for the petitioner. That is the way petitioner interprets the decisions of the United States Supreme Court.

The position of the Board on the other hand is that petitioner framed Jones, that its defense was an "obvious effort to construct a case against Jones and to cover up the real

reason for his discharge." They point to the fact that over a period of years Jones had been drunk many times before and had frequently been sent home for drunkenness or absented himself from work because thereof. They mention the fact that when Jones was discharged for drunkenness in 1934 he was reemployed three days later. So from all this the Board infers that even though Jones was drunk and unable to perform his work on July 24, 1937, he was not discharged for drunkenness but because of his union membership and activities. In other words, the Board holds that it can ignore an obvious and sufficient cause for discharge and infer from all other circumstances that petitioner had some other reason for firing its employee. The Court below accepted the inferences of the Board and refused to pass upon the issue of law upon which petitioner relied as its defense

The kindness and forbearance of petitioner over a period of years is now urged by the Board as a bar to its exercising the right to discharge an employee when he was so drunk he could not do his work.

The Court below, ignoring the rights of the employer and disdaining the authoritative utterances of the Supreme Court of the United States, refused to even pass upon petitioner's legal defenses.

We ask the Supreme Court to decide this issue at law which the Board first raised in its decision and order and again submitted to the Court below in its brief on page 18, and which petitioner presented in its brief on pages 21-22 and 26-31. **We have confidence that this Court will decide that even the president of a union must keep sober enough to perform his work or else be prepared to seek other employment; and that regardless of the Act, only the employer and not the Board has the power to forgive such misconduct on the part of an employee and to reinstate him to his former position.**

In *The Associated Press case,* supra, this Court said:

> "Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circum-

stances. The Act does not compel the petitioner to employ anyone; it does not require that the petitioner retain in its employ an incompetent editor or one who fails faithfully to edit the news to reflect the facts without bias or prejudice. *The Act permits the discharge for any reason other than union activity or agitation for collective bargaining with employees.* The restoration of Watson to his former position in no sense guaranteed his continuance in petitioner's employ.'"*

These are precarious times in which we live, days of uncertainty and of great social unrest. Employers and employees need to have this Court clarify their respective rights. Has the Board the power to order an employer to reinstate an employee who was discharged while drunk on on the job and unable to perform his work? We think the question is vital to national defense. When, as in this case, a Court of Appeals fails and refuses to follow the decisions of the Supreme Court, lawyers and laymen alike are dazed and in doubt as to what is the law. Petitioner thought this question was settled by the Supreme Court in 1937. The Board and the Court below apparently do not agree with petitioner. This, therefore, is an important question of Federal law which if it has not been settled should be settled by this Court.

II and III.

The decision of the Court below, sustaining the Board's order reinstating Jones, made the following findings and conclusions of law inconsistent with its own judgment or decree, "Much of the evidence on which the Board relied was contradicted; but it is for the Board, and not for us, to weigh conflicting testimony and pass upon credibility. Perhaps a reasonable mind might conclude that Jones was discharged solely for intoxication, but certainly a reasonable mind might conclude that there was a connection between his union activities and his discharge*; these findings and conclusions were (a) contrary to law, (b) in conflict with

*Italics and underscoring ours.

the decisions of other Circuit Courts of Appeal such as the decision of the Eighth Circuit in the case of Bussmann Mfg. Co. v. N. L. R. B., 111 F. (2d) 783, 786-787, in which the Eighth Circuit held that where the cause of an employee's discharge "may have been one of two things, one of which was illegal and the other legal, the fact finding tribunal can not guess between the two causes . . ."* and was in conflict with the Fourth Circuit in the case of Appalachian Electric P. Co. v. N. L. R. B., 93 F. (2d) 985, 989, in which the Court said, "In either case, substantial evidence furnishes a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences",* (c) has not given proper effect to applicable decisions of this Court, and (d) has so far departed from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Petitioner cannot understand why the Court below should have made such an error. The *Bussman* case was cited at great length in petitioner's brief on pages 29-31. We are forced again to the conclusion that the Court below decided to ignore the law and sustain the order of the Board regardless of the decisions of the Supreme Court and of other Circuit Courts of Appeal. Otherwise it seems to your petitioner that the Court below would have at least attempted to distinguish the facts in this case from the facts in cases cited by petitioner. The conclusion is inescapable that the reason the Court below did not attempt to distinguish these cases was that it could not do so. Therefore petitioner is forced to appeal to the Supreme Court to pass upon the legal questions arising in this case.

As if to justify its refusal to independently review the evidence and decide the issues of law in this case, the Court below said, "it is for the Board, and not for us, to weigh conflicting testimony and pass upon credibility." We sub-

*Underscoring ours.

mit that that was begging the question and was no excuse for refusing to pass upon the law; that no Court has a right to avoid its statutory duty by such a flimsy evasion.

Petitioner further urges that the findings and conclusions of the Court below that "*Much of the evidence on which the Board relied was contradicted*";* and that "*Perhaps a reasonable mind might conclude that Jones was discharged solely for intoxication, but certainly a reasonable mind might conclude that there was a connection between his union activities and his discharge*"* do not constitute a sufficient basis for a judicial judgment that there was substantial evidence "to sustain the Board's order regarding Jones." To find that there might be a "connection between his union activities and his discharge" is insufficient at law.

For as was said by this Court in *N. L. R. B.* v. *Columbian Enameling and Stamping Co., Inc.*, 306 U. S. 292, 299, 83 L. ed. 660, 665,

> "Section 10 (e) of the Act provides '. . . The findings of the Board as to the facts, if supported by the evidence, shall be conclusive.' But as has often been pointed out, this, as in case of other findings by administrative bodies, *means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred.** Washington, V. and M. Coach Co. v. N. L. R. B., 301 U. S. 142, 81 L. ed 965, 57 S. Ct. 648; Cons. Edison Co. v. N. L. R. B., decided December 5, 1938, (305 U. S. 197, ante, 126, 59 S. Ct. 206); Appalachian Elec. P. Co. v. N. L. R. B. (C. C. A. 4), 93 F. (2d) 985, 989; N. L. R. B. v. Thompson Products (C. C. A. 6), 97 F. (2d) 13; Ballston-Stillwater Knitting Co. v. N. L. R. B. (C. C. A. 2), 98 F. (2d) 758, 764. Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Cons. Ed. Co. v. N. L. R. B., 305 U. S. 197, ante 126, 59 S. Ct. 206, supra, *and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the*

*Italics ours.

*conclusion sought to be drawn from it is one of fact for the jury.** See B. & O. R. R. Co. v. Groeger, 266 U. S. 521, 524, 69 L. Ed. 419, 422, 45 S. Ct. 169; Gunning v. Cooley, 281 U. S. 90, 94, 74 L. ed. 720, 724, 50 S. Ct. 231; Appalachian E. P. Co. v. N. L. R. B., supra (C. C. A. 4), 93 F. (2d) 989."

IV, V and VI.

The decision of the Court below of December 9, 1940, as amended by its order of January 14, 1941, denied petitioner that due process of law guaranteed by the Fifth Amendment of the Constitution of the United States by stating the issues in this case so as to enable the Court to avoid its duty under the Act, by omitting from the Court's statement of facts those findings of the Board which were favorable to petitioner and upon which petitioner relied in refusing to obey the order of the Board, by evading its duty to decide the issues of law raised by said omitted facts, and, after the inclusion of certain of these facts in its amended order, by the persistent refusal of the Court below to pass upon the legal issues arising therefrom.

The facts supporting the above averments have been heretofore fully presented in this petition, and in our Petition for Rehearing and Second Petition for Rehearing. (R. 521, 539).

This Court has held that parties involuntarily brought before government administrative agencies have a right to a fair and impartial hearing, decision and order. For a Court to mis-state the issues, to omit material facts, to evade deciding upon the merits of an employer's defense, is, petitioner respectfully urges, a gross and inexcusable denial of due process.

In Corpus Juris Secundum, vol. 16, it is said with respect to the constitutional right of due process:

> "These guaranties do require, however, that the substance of property rights be preserved, that the courts accord the parties due process in determining adjective

*Italics ours.

and substantive law, and that some adequate and appropriate remedy be afforded for the vindication of personal and property rights. (p. 1222.)

"Due process requires a judicial determination of the issues by an impartial tribunal, competent by the law of its creation to pass upon the subject matter of the suit." (pp. 1241-1242.)

VII and VIII.

The decision of the Court below by accepting the uncorroborated testimony of Jones as substantial evidence supporting the Board's order, by its refusal to pass upon the credibility of Jones' testimony (Petitioner's brief, pp. 13-16), when the record and the findings of the Board established that Jones was a drunken prevaricator, who repeatedly gave false testimony on material issues at the Board's hearing; and by holding that there was substantial evidence that petitioner had engaged in unfair labor practices within the meaning of Sec. 8 (3) of the Act, was (a) in conflict with the decision of the Fifth Circuit in the case of Magnolia Petroleum Co. v. N. L. R. B., supra, where it was held, "In its capacity as an accuser, the Board like any other person on whom the burden of proof rests to establish the right of a controversy, must produce credible evidence* from which men of unbiased minds can reasonably decide in his favor. It cannot any more than any other litigant can 'leave the right of the matter to rest in mere conjecture and expect to succeed'. Samulski v. Menasha Paper Co., 147 Wis. 285, 133 N. W. 142, 145; "It is the duty of the Board to decide the case before it on all the evidence. It is not at liberty to rely upon part of the evidence in support of its findings and put aside all other undisputed evidence", P. & O. S. S. Co. v. N. L. R. B., 98 F. (2d) 411, 415; (b) has not given proper effect to applicable decisions of this Court, as was said in N. L. R. B. v. Columbian E. & S. Co., Inc., supra, "But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred.*

*Underscoring ours.

Every volume of Corpus Juris Secundum has, as its foreword, the statement of Chief Justice Greene, from I. R. I. 356,

> "The law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society. But this progress must be by analogy to what is already settled."

Since time immemorial it has been the custom of Courts to set aside the verdicts of juries when they were obviously the result of prejudice, were not sustained by the evidence, were contrary to the evidence or contrary to law.

The National Labor Relations Act created certain rights and vested the administration and enforcement of these in the National Labor Relations Board. There is not one word in this Act that changes the substantive law, that deprives Courts of their inherent right, their duty, to correct the errors of fact and law committed by this new administrative agency. The decisions of this Court in *N. L. R. B.* v. *Waterman S. S. Co.*, 309 U. S. 206, and in *N. L. R. B.* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, certainly do not pretend to destroy these fundamental safeguards of the law In fact they but reaffirm the right of the last Court to re-examine the facts and arrive at its own conclusion as to the law.

This Court has repeatedly affirmed its right to re-examine the evidence in a Labor Relations case and to sustain or reverse the findings of the Board or of a Circuit Court of Appeals. In *N. L. R. B.* v. *Sands Mfg. Co.*, 306 U. S. 332, 341, 83 L. ed. 682, 688, it was said by this Court where,

> "The Board supports the conclusion by reference to the testimony of two men . . . Manifestly it is not only insufficient to sustain any such conclusion but definitely refutes it."

Therefore it is inconceivable to petitioner that this Court will sustain the Board and the court below in their decisions based upon the self-serving, uncorroborated testimony of

Jones. Yet without the testimony of Jones neither the Board nor the court below had any evidence that Jones ever joined a union, attended a union meeting, was active on behalf of the union or had any of the conversations with Branch or Mr. Viner, upon which findings the Board and the court below found petitioner guilty of violating Section 8(3) of the Act.

The most amazing thing about the decisions of the Board and the court below is that they reject the testimony of Jones with respect to the simplest facts and accept his testimony with respect to conversations, the most difficult thing for even an intelligent witness to remember. This testimony as to conversations was accepted as true notwithstanding the denials of Branch and Mr. Viner.

After making such an egregious error the Board, with the court's approval, then bolstered its courage and sought to justify its conduct by finding, "The testimony of Branch and Harry Viner shows an obvious effort to construct a case against Jones and to cover up the real reason for his discharge." (R. 47.)

We respectfully submit that this is just an elegant way of saying that petitioner framed Jones. Did petitioner get Jones drunk? Did it give him the liquor? Did it ever encourage him to use it? If petitioner or its officers had done any of these things to provide an excuse to discharge Jones, then the Board might well have found that petitioner was guilty of constructing a case against him. Since, however, the uncontradicted testimony of Branch shows that on the day of Jones' discharge a futile effort was made by Melvin Viner, an officer of the company, to sober Jones up so that he could do his work, and when these efforts failed Jones was discharged, the statement by the Board becomes ridiculous.

We submit to the Court that the evidence tends to show that the Board constructed a case against this petitioner. In support of this averment we offer the following, (1) Why did the Board not offer in evidence some documentary

proof or corroboration of Jones's union membership, if he was a member? The Board offered such documentary evidence to prove the union membership of Parker who testified that he joined the union about June 26, 1937. (R. 137, 156-158.) (2) Why did it not offer corroborative evidence to prove that Jones attended union meetings or acted on behalf of the union? (3) What justification then did the Board have for its statement, "We are satisfied that Jones's union membership, his attendance at union meetings and his conspicuous conduct in refusing to sign the loyalty petition proved more obnoxious to the respondent than his alleged ten years of drunkenness." (Petitioner's brief, pp. 19-23, R. 185-186.) (4) Adding insult to injury the Board in its brief below on page 20 describes this drunken prevaricator as follows, "In order to overcome *this affirmative evidence establishing that Jones in fact was discharged because of his known prominence in the union,** respondent sought to have it appear that the discharge was due to Jones's habitual drunkenness." Jones was so prominent in the union that he never had a membership card, could not remember more than one employee to whom he ever talked about the union, never got a member to join the union, and did not or could not furnish any other union member to testify on his behalf either as to his membership or his activities on behalf of the union. This is the man the Board's appellate counsel had the effrontery to describe as "prominent in the union." (R. 172-177.)

We submit that this case is a striking example of the Board's efforts to enlarge its statutory authority, despite the holding of this Court in the *Jones Laughlin Steel* case, *supra,* later quoted with approval in the *Fansteel Metal. Corp., supra* at 306 U. S. 254 that,

> "the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion."

*Italics ours.

While petitioner admits that there is some evidence in the record of its violation of Section 8(1) of the Act, it denies that there is any substantial evidence to sustain the decision of the court below that petitioner violated Section 8(3) in discharging Jones on July 24, 1937, when he was so drunk that he could not do his work.

IX.

The decision of the court below, in requiring the posting of notices has decided a federal question in conflict with an applicable decision of this court, N. L. R. B. v. Express Publishing Co., supra.

Prior to the opinion of the Supreme Court in the *Express Publishing Company* case there was uncertainty as to the law governing the posting of cease and desist notices. The statement in the decision of the court below on December 9, 1940, that this question was settled by the *Falk* case, was contrary to the opinion of other circuit courts. Its further statement that after the decision in *Art Metals Const. Co.* v. *N. L. R. B.*, 110 F. (2d) 148, 151, the Supreme Court had upheld this right of the Board in *N. L. R. B.* v. *Falk Corporation*, 308 U. S. 453, 462, was factually and legally incorrect. The second Circuit in the *Art Metals* case had refused to follow the Supreme Court's decision in the *Falk* case as authoritative in requiring an employer to admit his guilt by posting "cease and desist" notices.

In the *Express Publishing Company* case this Court decided that while the Board had the power to require an employer to post notices that it "will not engage in the conduct from which he is ordered to cease and desist," the power of the Board to make such an order is limited to the unfair labor practices which an employer has been proven guilty of violating, or that "bear some resemblance to that which the employer has committed." Therefore this Court modified paragraph 1(b) of the Board's order by limiting that paragraph to the unfair labor practices which the Express Publishing Company had been found guilty of violat-

ing. This Court refused to make the employer post paragraph 1(b) as ordered by the Board.

On March 7, 1941, in its oral argument, and on March 12, 1941, in its Second Petition for Rehearing (R. 539) petitioner herein called the attention of the court below to the holding of this Court on March 3, 1941 in the *Express Publishing Company* case.

The order of the court below of March 7, 1941, accepted the modification by the Board of the form of notices to be posted, but rejected the authoritative decision of this Court on the SUBSTANCE OF SAID NOTICES. The court below therefore erred in refusing to modify the Board's order requiring petitioner to post the identical paragraph 1(b) of the Board's order in this case. (cf. R. 50 with XIII NLRB 1213, 1227.) Yet this Court had held on March 3, 1941, that the Express Publishing Company could not be required to post notices that it would not violate the provisions of Section 8(1) when it had only been found guilty of violating Section 8(5). Petitioner showed the court below that it had never been charged nor found guilty of violating the provisions of Section 8(5) and yet was ordered to post paragraph 1(b) including "In any manner interfering with" the efforts of its employees "to bargain collectively through representatives of their own choosing".

Petitioner respectfully says that this is in violation of the holding of this Court in *Express Publishing Co., supra,* where the Court said,

> "We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found."

Respondent further respectfully contends that it has already fulfilled more than its obligation under the Act and the decision of this Court in posting the notices shown on page 5 of its Brief.

CONCLUSION.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari, to review the judgment of the United States Court of Appeals for the District of Columbia, should be granted.

IRVING G. MCCANN,
923 Fifteenth St., N. W., Washington, D. C.

ALVIN L. NEWMYER,
1001 Fifteenth St., N. W., Washington, D. C.

JOSEPH A. KAUFMANN,
1001 Fifteenth St., N. W., Washington, D. C.

APPENDIX.

National Labor Relations Act.
Title 29, U. S. C. A. Sections 158 and 160.
(49 Stat. 449)

RIGHTS OF EMPLOYEES.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

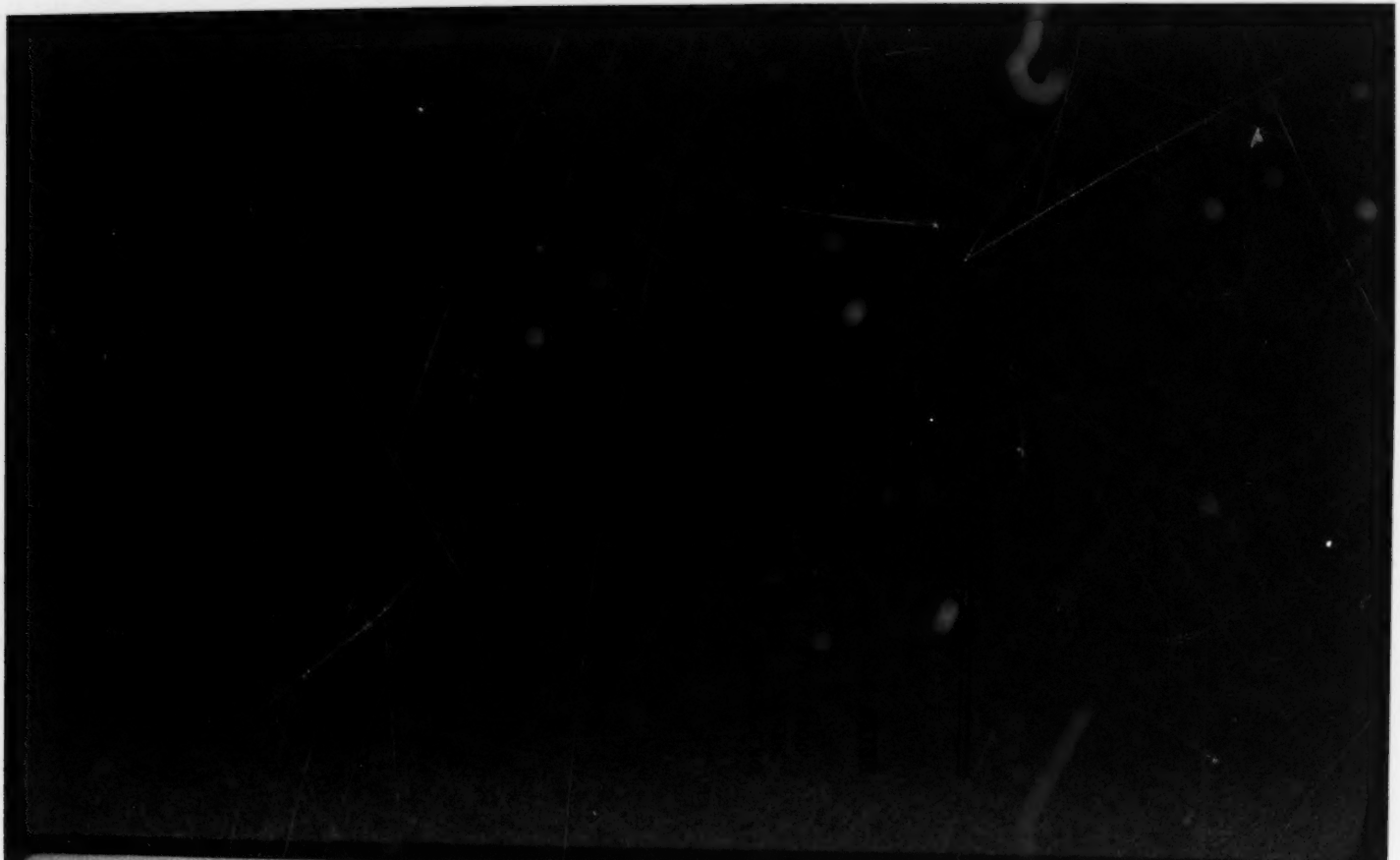
(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

PREVENTION OF UNFAIR LABOR PRACTICES.

SEC. 10. (e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except

that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.



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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 864

ARCADE-SUNSHINE COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 515–519) is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 33–51) are reported in 12 N. L. R. B. 259.

JURISDICTION

The decree of the court below was entered on December 9, 1940 (R. 537–538). Petitions for

rehearing filed by petitioner were denied on January 14, 1941 (R. 525–526), February 6, 1941 (R. 535), and March 13, 1941 (R. 543). The petition for a writ of certiorari was filed on March 22, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence to support the Board's finding that petitioner discharged William Jones in violation of Section 8 (3) and (1) of the Act.

2. A further question urged by petitioner, but which we think is not properly presented, is whether, in the circumstances of this case, the Board could properly order petitioner to post notices stating *inter alia* that it would not interfere with its employees' right to bargain collectively.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 33–51). The facts found by the Board and shown by the evidence, omitting those relating to

jurisdiction, which is not in question, may be summarized as follows.[1]

Laundry Workers, Cleaners & Dyers Union (herein called the Union) initiated a campaign to organize the laundry workers of the District of Columbia in February 1937 (R. 37; 75–76, 99–100, 112–113). Leaflets were distributed, organizing meetings were held, and a number of petitioner's employees joined the Union (*ibid.*).

In the latter part of June 1937, the Union called a city-wide strike, and although petitioner's employees were not asked to participate in the strike the Union picketed petitioner's plant for several days and some of petitioner's employees voluntarily took part in the picketing (R. 37; 61, 66–67, 417–419, 496).

In the latter part of June 1937, the employees of petitioner's flat-work department, all of whom were colored women, stopped work for a few minutes in support of a demand for a wage increase. Melvin Viner, petitioner's vice president, assured the employees that they would be given a wage increase as soon as his father, petitioner's president, returned to the city (R. 37; 104–105, 109–110, 113–115, 128–129). Several days later, these employees assembled in the plant locker room at the direction of their forelady (R. 38; 100–101, 115–116, 132, 380–381). President Harry Viner

[1] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

informed them that they would get the promised wage increase; he then introduced John Risher[2] to them as a member of their race who would "show [them] the right way to go" (R. 38; 101). Risher told the employees that "the union . . . didn't make any good to [them]," that it was "of no service to the black face," that it was "only trying to get [their] money," that "he would prefer" that they "not . . . bother with the union and that he thought it was best for [them] to organize a union of [their own]" (R. 38; 133, cf. 116, 101, 301–302).

A few days later, while the plant was being picketed, petitioner's officers and supervisors went among the workers and urged[3] them to sign a "loyalty" petition (R. 38–39; 279, 282–283, 285–286, 375–377, 417–420, 393, 104, 102, 129). This "loyalty" petition read as follows (R. 493):

> We, the undersigned, agree to be loyal to the Arcade-Sunshine and remain at our post under present working conditions.

Three hundred and thirty-one of the 357 employees signed the petition (R. 39; 329).

---

[2] Risher had worked for petitioner and for President Harry Viner "in a personal capacity" for many years (R. 38; 296, 326–327).

[3] Vice-President Leonard Viner, in requesting a group of employees to sign the petition, told them, according to uncontradicted testimony, "We have got to look for business and make ourselves a living and if you don't join the union and you will go back to work under present conditions, sign this" (R. 104; 102).

On July 3, 1937, Personnel Manager Brisker reprimanded William Parker, an employee, for trying "to agitate the union" and for "trying to get the drivers to join", and warned Parker that he might lose his job (R. 40; 138, 139, 141). That same night President Viner accused Parker of "agitating the union among the drivers" (R. 41; 144, 162). Parker quit his employment that night (R. 45).[4] Several months later Parker requested President Viner to reemploy him; Viner, after commenting upon Parker's dire need and stating that he had got no "benefit" from the Union (R. 41; 146–147), lent Parker $2, and urged him to "talk to the employees * * * to keep them from joining the union" (*ibid.*). Shortly thereafter Parker was rehired on condition that he abstain from union activity (R. 41–42; 150–151).

The Board found that Risher's speech, the circulation of the "loyalty" petition, and the statements to Parker, interfered with the exercise by petitioner's employees of the rights guaranteed in Section 7 of the Act, and therefore that they violated Section 8 (1) (R. 42, 49).

William Jones, a presser and steamer of garments, began to work for petitioner in 1926 (R. 45; 495). Except for a 3-day interval in 1934,[5] he remained in petitioner's employ until his discharge

---

[4] The Board dismissed the charge that Parker had been discriminatorily discharged although it thought his case "not free from doubt" (R. 44–45).

[5] He was discharged for "drinking while working", but was rehired 3 days later (R. 45; 484, 485, 495).

in 1937 (R. 45; 170, 484–485, 495). In May 1937, Jones joined the Union and attended meetings, distributed union circulars, and talked about the Union (R. 45; 173, 177, 180).

In June 1937 Jones' foreman questioned him about a union meeting; thereafter President Viner also questioned him about a union meeting, and when Jones professed not to know what had occurred, Viner reproved him, saying, "You can't fool me; I know" (R. 45; 174–175, 176–177). Shortly prior to his discharge, Jones demonstrated his loyalty to the Union by refusing, in the presence of Vice-President Melvin Viner, to sign the "loyalty" petition (R. 45; 185–186).

On July 24, 1937, Jones was under the influence of liquor and could not perform his work (R. 45). Observing his condition, Foreman Branch instructed Jones to go home for a few days and to report to President Viner before returning to work (R. 45; 222, 224). Admittedly, however, Branch did not consider Jones discharged at that time (R. 226). On the following Wednesday, when Jones reported for work, he was not permitted to work; instead he was referred to President Viner, who confirmed his dismissal, and told him that he had talked too much "about the Union" (R. 46; 189).

Petitioner contended that it discharged Jones because he was frequently under the influence of liquor. His foreman testified that Jones was drunk practically every day of the eleven years that he had worked for petitioner and that his

usual output was about 10 or 12 percent of a fair day's work (R. 212–213); President Viner testified that he had instructed the foreman to discharge Jones on "about a hundred or two hundred" occasions, and at times as often as "three times a day" (R. 46–47; 442, 436). The Board concluded, as did the Trial Examiner, that this testimony was fabricated to conceal the real reason for Jones' discharge (R. 47; 25). The Board found that petitioner discharged Jones "because of his membership in and activity on behalf of the Union" (R. 48), in violation of Section 8 (3) and (1) of the Act.

Upon these findings, the Board ordered petitioner to cease and desist from the unfair labor practices found; to offer reinstatement with back pay to Jones; to pay to governmental relief agencies sums equal to the amounts disbursed by those agencies for the employment of Jones on work-relief projects; and to post appropriate notices (R. 50–51).

On February 6, 1940, the Board filed in the court below a petition for enforcement of its order against petitioner (R. 1–4). On March 12, 1940, petitioner moved in the court below for permission to post notices that it would cease and desist from certain practices and for a summary order denying enforcement to the affirmative provisions of the Board's order (R. 502–506). On June 7, 1940, the court denied petitioner's motion (R. 514). On December 9, 1940, the court handed down its opinion

(R. 515–519) and entered a decree (R. 519–521) enforcing the Board's order, except as to the "work relief" provision held invalid in *Republic Steel Corp.* v. *National Labor Relations Board,* 311 U. S. 7, which the court set aside.

A petition for rehearing filed by petitioner (R. 521–525) was denied on January 14, 1941 (R. 525–526). Leave to file a petition for reconsideration of the petition for rehearing (R. 527–533) was granted, and the petition was again denied, on February 6, 1941 (R. 535). On March 7, 1941, the court of its own motion amended its opinion and decree with regard to the contents of the notices which petitioner was required to post, by substituting the statement that petitioner would "not engage" in the unfair labor practices found for the statement that it would "cease and desist" therefrom (R. 518–519, 536–538, 542). A further petition for rehearing (R. 539–542) was denied on March 13, 1941 (R. 543).

ARGUMENT

1. Petitioner contends that the main issue in this case is whether the presence of a valid cause for the discharge of an employee conclusively establishes that the employer did in fact discharge the employee for that cause; that the court below avoided deciding that issue by omitting to state in its opinion, as originally filed, that the Board found that Jones was under the influence of liquor on the day of his discharge and could not do ~~the~~ his work; and

that the court thereby deprived petitioner of due process.

The petitioner's contention, which he claims that the court below refused to decide, is plainly frivolous. The presence of a valid cause for a discharge, though relevant to explain what otherwise appears to be a discriminatory discharge, is not conclusive, but merely gives rise to a conflict in the evidence, the resolution of which is for the Board. Compare *National Labor Relations Board* v. *Bradford Dyeing Association,* 310 U. S. 318, 330–333; *National Labor Relations Board* v. *Link-Belt Co.,* Nos. 235, 236, this Term, decided January 6, 1941; *National Labor Relations Board* v. *Remington Rand, Inc.,* 94 F. (2d) 862, 870 (C. C. A. 2d), certiorari denied, 304 U. S. 576; *Hartsell Mills Co.* v. *National Labor Relations Board,* 111 F. (2d) 291, 292 (C. C. A. 4th).

Following the petitioner's petition for rehearing, the court below amended its opinion to state that the Board found that Jones was under the influence of liquor when discharged (R. 525). Thereby the court plainly indicated its rejection of petitioner's contention that the presence of a valid cause for Jones' discharge precluded the Board from finding that his discharge was in violation of the Act. It is, moreover, a novel suggestion that an omission by a court to discuss an issue in its opinion constitutes a denial of due process.

What petitioner really seeks is to have this Court review the sufficiency of the evidence to support the Board's finding that the discharge of Jones was violative of the Act. This question is, of course, of no general importance; petitioner so realizes, but seeks to becloud the case by unrestrained attacks on the court below. (See Pet. 10–11, 8–9.) This invective is particularly unwarranted in view of the patience exhibited by the court below in its consideration of petitioner's repeated applications for rehearing.

2. Petitioner also contends (Pet. 4, 28–29) that the court below did not follow the decision of this Court in *National Labor Relations Board* v. *Express Publishing Company,* No. 442, this Term, decided March 3, 1941. Its argument is that it had not violated Section 8 (5) of the Act (which requires an employer to bargain collectively with its employees' statutory representative), and that therefore the Board could not require it to post notices stating, *inter alia,* that it would not interfere with its employees' right to bargain collectively.

Petitioner did not object to the Board's order on this ground when its validity was under consideration by the court below.[6] To the contrary, petitioner in effect invited the court below to affirm

[6] Petitioner concedes (Pet. 29) that the objection was not urged until after the court below had rendered its decision and had denied petitioner's first petition for rehearing.

this provision of the order by stating in its brief: "Respondent has been ready and willing to post notices for a long time, * * * such offer renders this question moot" (Pet. brief below, pages 4–6). It further stated in its brief below that it had voluntarily posted notices containing the very statement to which it now objects (*ibid.*). It is not surprising, therefore, that the court below did not mention the point either in its original decision or in its opinion on rehearing. This Court has repeatedly indicated that it does not regard the affirmance of an order under such circumstances as an adjudication meriting review. *J. Greenebaum Tanning Co.* v. *National Labor Relations Board,* No. 152, this Term, certiorari denied, October 14, 1940; *Subin* v. *National Labor Relations Board,* No. 280, this Term, certiorari denied, October 14, 1940; *Viking Pump Co.* v. *National Labor Relations Board,* No. 606, this Term, certiorari denied, January 13, 1941.

Apart from these considerations, there is no merit in petitioner's contention. In the *Express Publishing* case this Court made it clear that a cease and desist order of the breadth here involved is warranted where "the record disclose[s] persistent attempts by varying methods to interfere with the right of self-organization in circumstances from which the Board or the Court [finds] or could [find] the threat of continuing and varying efforts to attain the same end in the future." The present case falls within this rule, since the facts

here reveal grave and diverse violations of the Act, inspired by a strong anti-union bias on the part of petitioner's officials. Accordingly, this case falls squarely within the holdings in *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 567, 568, 571; and *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 543, 544.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.
THOMAS E. HARRIS,
Special Assistant to the Attorney General.
ROBERT B. WATTS,
General Counsel,
LAURENCE A. KNAPP,
Associate General Counsel,
ERNEST A. GROSS,
Assistant General Counsel,
ROMAN BECK,
Attorney,
National Labor Relations Board.

MARCH 1941.

APPENDIX

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V, Secs. 157, 158, 159, 160) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> * * * * *
>
> SEC. 10 (e). * * * No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1941